Date: November 7, 1995

Case No.: 94-INA-00389

In the Matter of:

STEFAN & JADWIGA BOCHNA,
Employer

On Behalf of:

KRZYSZTOF BUDZISZEWSKI,
Alien

Before: RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On July 20, 1992, Stefan & Jadwiga Bochna ("Employer") filed an application for labor certification to enable Krzysztof Budziszewski ("Alien") to fill the position of Apple Orchard Manager (AF 7-8). The job duties for the position are:

> Will set up and manage apple orchard. Selects and purchases seedlings, fertilizer and farm machinery. Will oversee planting, irrigating, fertilizing, spraying and pruning of trees, cultivating and harvesting of fruit, and sale to buyers.

The requirements for the position are two years of college majoring in Agriculture, and three years of experience in the job offered.

The CO issued a Notice of Findings on January 14, 1994 (AF 33-36), proposing to deny certification on the grounds that it does not appear that the Employer will be able to offer a permanent, full-time job. Additionally, the CO stated that it appears that the Employer's orchard relies for its very existence upon the skills and abilities possessed by the Alien, which means that the Alien is such an integral part of the orchard that he cannot practically be separated from it; therefore, there is no employer/employee relationship and it is doubtful that an actual job exists. Further, the CO found that one U.S. applicant, Burt Reynolds, was rejected unlawfully as he has not been established to be unqualified nor has a *bona fide* position been established.

Accordingly, the Employer was notified that it had until February 18, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, dated February 14, 1994 (AF 37-44), the Employer contended that: (1) the Employer does own the property which will become the apple orchard; (2) U.S. workers are able to be referred for employment; (3) the Alien is independent from the employer, and an employer/employee relationship will exist; and, (4) the U.S. applicant was rejected for lawful, job-related reasons.

The CO issued the Final Determination on February 22, 1994 (AF 45-47), denying certification because the Employer has failed to document lawful and/or job-related reasons for rejection of a U.S. applicant, and because the Employer has failed to establish that a *bona fide* job opening exists.

On March 16, 1994, the Employer requested review of the Denial of Labor Certification (AF 50-58). On April 20, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a brief on June 27, 1994.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

Discussion

Section 656.20(c)(8) requires that the employer show that the job has been, and is clearly open to qualified U.S. workers; that a *bona fide* job opportunity exists. Although the words "*bona fide* job opportunity" do not appear in the regulations, this administrative interpretation has been upheld, as it "clarifies that the job must truly exist and not merely exist on paper." *Pasadena Typewriter and Adding Machine Co., Inc., and Alirez Rahmety v. U.S. Dept. of Labor,* No. CV 83-5516-AABT (C.D. Cal. 1987). The employer has the burden of proving by clear and convincing evidence that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers, and that the employer has sought, in good faith, to fill the position with a U.S. worker. *Amger Corp.*, 87-INA-545 (Oct. 15, 1987) (*en banc*).

An employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. 20 C.F.R. § 656.21(b)(6). Furthermore, the job opportunity must have been open to any qualified U.S. worker. 20 C.F.R. § 656.20(c)(8). Therefore, an employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications.

At issue here is whether a *bona fide* job opportunity exists, and whether the Employer rejected the lone U.S. applicant for lawful, job-related reasons.

Bona Fide Job Opportunity:

The Board has applied a totality of the circumstances test in determining whether there is a *bona fide* job opportunity. See *Modular Container Systems Inc.*, 89-INA-228 (July 16, 1991) (*en banc*). The factors to be examined, but not limited to, are whether the alien is in the position to control or influence the hiring decision; is related to the corporate officers, director, or owners; is one of a small number of employees, and has identical qualifications as stated on the application. *Id.* While a family relationship between the employer and employee promotes a higher level of scrutiny, it does not, *per se,* require denial of certification. See *Paris Bakery,* 88-INA-337 (Jan. 4, 1990) (*en banc*); *Altobeli's Fine Italian Cuisine,* 90-INA-130 (Oct. 16, 1991).

In the Final Determination, the CO found that although the Employer submitted a deed to 35 acres of farmland that he owns, and a certificate stating he intends to grow apples on that property, the Employer's rebuttal was insufficient to establish that a *bona fide* job opportunity exists, because there is no orchard currently in operation, it is a "potential operation and not yet a reality," there are no current employees, and therefore, there is no job opening for which U.S. workers can be referred (AF 45-46).[2]

[2] Employer's Counsel argues in his request for review that the CO did not raise "the issue of potentiality" in the NOF, and is therefore barred from questioning that issue in the Final Determination (AF 57-58). The CO states in the NOF that the Employer's certificate "implies that employer is a potential orchard owner wherein employer states he intends to grow apples on 35 acres of farmland" (AF 35). We find that the CO did not raise the issue of "potentiality" for the first time in the Final Determination.

The absence of a pre-existing position is not a *per se* bar to labor certification, but the employer must prove that it has definite plans for business expansion, and that the expansion will generate full-time, permanent work. *Mourens-Laurens Oil Co.*, 91-INA-236 (Aug. 11, 1992). In this case, the file contains a statement from the local employment office that the Employer intends to sell the produce from the orchard in Orange County, New York, at his place of business in New Jersey (AF 22-23). However, the record does not contain any description of the Employer's business in New Jersey, any definite plans of expansion for that business, or any explanation of how the apple orchard would fit into such plans.

The burden of proof for obtaining labor certification lies with the employer. 20 C.F.R. § 656.2(b). Without further documentation, it appears the no true employer-employee relationship exists, taking into consideration that the Alien is related to the Owner/Employer, he would be the only employee, the orchard does not yet exist, and the record contains no specific description of the Employer's business, plans of expansion, or description of how an apple orchard fits into any plan of business expansion. See *Modular Container*, *supra*.

Unlawful Rejection of U.S. Workers:

The CO also rejected the application because the Employer failed to document a lawful, job-related reason for rejecting the lone U.S. applicant, Mr. Burt Reynolds (AF 46). In rebuttal, the Employer states that Mr. Reynolds was rejected because "he wanted a position as a consultant, not a manager," and "he indicated he might have difficulty meeting the physical demands of the position" (AF 43). The local employment office provided a statement that Mr. Reynolds believed that the Employer "had no intention of hiring for the advertised job," "was told there was no guarantee of a job," and "questioned the authenticity of the job" (AF 18).

Generally, an employer unlawfully rejects a U.S. applicant who satisfies the minimum requirements specified on the ETA 750, and the application for the position. See *American Cafe*, 90-INA-26 (Jan. 25, 1991); *Cal-Tex Management Services*, 88-INA-492 (Sept. 19, 1990). Here, the Employer does not contend that Mr. Reynolds did not have the qualifications required on the application, but states that he was not interested in the position (AF 43). An employer may reject a qualified U.S. applicant who is shown not to be interested in the job. *New Consumer Products*, 87-INA-706 (Oct. 18, 1988) (*en banc*). However, the Employer in this case has not documented that the applicant was offered the job and rejected it, or failed to respond to the Employer in any way. See *United Cerebral Palsy of the Island Empire, Inc.*, 90-INA-527 (Aug. 19, 1992); *Composite Research, Inc.*, 91-INA-177 (Oct. 1, 1992). Moreover, the Employer cannot discourage the applicant by indicating there was no guarantee of a job. See *Noh Mask and Unfolding Futon*, 89-INA-144 (Feb. 7, 1990).

The Employer has failed to carry its burden and establish the applicant's lack of interest in the position, considering the lack of documentation as to whether the applicant was offered, and rejected the position, the statements of the applicant from the local employment service, and the fact that the orchard did not exist at the time of the applicant's interview. See *United Cerebral Palsy*, *supra.*

Denial of certification because no *bona fide* job opening exists to which U.S. workers can be referred, and failure to adequately document a lawful, job-related reason for the rejection of a U.S. worker was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 2002, for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.